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Supreme Court, U.S.
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No. 97-656

In The

Supreme Court of the United States

October Term, 1997

CENTRAL OFFICE TELEPHONE, INC.,

Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

REPLY TO BRIEF OF RESPONDENT AT&T IN OPPOSITION TO PETITION

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REASONS FOR GRANTING THE WRIT

1. Initially, it is necessary to correct a misstatement by AT&T in the very first line of its brief. This is not, as AT&T states, the second petition that seeks review of the Ninth Circuit's judgment below. This is the first petition, having been filed August 27, 1997, and placed on the docket October 15, 1997. Appendix to COT's Reply (hereinafter "Reply App.") 1. AT&T's petition, related to the filed rate doctrine, is the second petition. It was filed October 16, 1997, and placed on the docket October 17, 1997. Reply App. 3.

2. AT&T next describes COT's claims in a manner that is also incorrect. AT&T was not held liable for merely "breaching alleged promises to provide better service than required by its F.C.C. Tariff." AT&T's Brief in Opposition (hereinafter "AT&T Br.") 1. AT&T was held liable for willful misconduct, including its intentional interference with COT's business relationships with customers. COT's Petition Appendix (hereinafter "COT Pet. App.") 77. This misstatement, and several other misstatements made by AT&T in its strained attempt to invoke the filed rate doctrine, are corrected with specificity in COT's Respondent's Brief in Opposition to AT&T's Petition for Certiorari (No. 97-679) at 4-8. That discussion will not be repeated here.

3. Third, AT&T asserts that the relief COT seeks, a new trial, would benefit AT&T and harm COT. COT strongly disagrees with any assertion that it is not in

its interest to seek a new trial in this case. A jury decided in favor of COT on its claims and found that COT had sustained $13,000,000 in damages. The district court reduced that amount to $1,154,000 and invaded the province of the jury in doing so. A new trial will not harm COT. It will relieve COT from the district court's error in denying a remititur and will allow COT to present evidence of damages far in excess of the amount fixed by the district court. Further, contrary to AT&T's assertions, a new trial would be as to damages only. As COT's petition demonstrates (COT's Petition for Certiorari (hereinafter "COT Pet.") at 16-17), this is not a case where liability and damages are interwoven, and so a new trial as to liability is unnecessary.

4. AT&T cites several cases for its proposition that a trial court has the authority, consistent with the Seventh Amendment, to enter judgment for an identifiable portion of the jury's damage award, rather than order a new trial. However, all of the cases cited are readily distinguished in that they truly involved awards for distinctly separate damage amounts.

In New Orleans Insurance Company v. Piaggio, 83 U.S. 378, 21 L. Ed. 358 (1872), the jury awarded $7,000 under an insurance policy for a wrecked vessel, $5,700 under a separate policy for the freight in the vessel, "and the further sum of $5,000" for the detention of the money due under the policies. Since the latter $5,000 was not legally supported, it was taken away without a new trial. Indeed, the Court noted that the jury's verdict was in the

nature of a special verdict, which, unlike a general verdict, can be corrected without a new trial. 83 U.S. at 387.

New York, Lake Erie and W.R. Co. v. Estill, 147 U.S. 591, 13 S. Ct. 444 (1893), involved the denial of a separate allowance of interest, which was not recoverable under the law at issue.

Garrett v. Faust, 183 F.2d 625 (3rd Cir. 1950), cert. denied, 340 U.S. 931 (1951), was a case in which interrogatories were submitted to the jury, so it again required no intuition by the trial court as to how much of the damages were legally unsupported.

McKinnon v. City of Berwyn, 750 F.2d 1383 (7th Cir. 1984), also cited by AT&T in support of its proposition, in fact stands for just the opposite. The Seventh Circuit held that the trial judge, who had remitted $20,000 of the damages assessed by the jury, violated proper procedure in failing to give the plaintiff the option of a new trial:

> The Seventh Amendment reserves the determination of damages, in jury trials within its scope, to the jury. A federal judge can set aside a jury verdict as excessive, but he can fix the proper level of damages only if the plaintiff is entitled to a particular amount of damages as a matter of law (for example where a statute specifies a fixed sum as liquidated damages for a

> violation) -- which is not the case here.

750 F.2d at 1392.

In Westchester Fire Ins. Co. v. Hanley, 284 F.2d 409 (6th Cir. 1960), cert. denied, 365 U.S. 869 (1961), the jury was not instructed that an apportionment clause in an insurance policy limited a plaintiff's recovery to 75% of its damages. In fact, the trial court incorrectly instructed the jury that it could award the full amount claimed without any reduction. 284 F.2d at 418. Again, no guessing or intuition was required to correct that error without a new trial.

In State of Washington v. United States, 214 F.2d 33 (9th Cir.), cert. denied, 348 U.S. 862 (1954), the trial court reduced a jury's verdict to nominal damages ($1.00) without ordering a new trial, rather than entering a judgment notwithstanding the verdict. However, the parties treated the procedure for purposes of the appeal as if the trial court had simply set aside the verdict as not supported by substantial evidence. 214 F.2d at 37. Moreover, the Ninth Circuit, while noting that the parties had so treated the procedure, expressly stated that it did not approve the procedure employed by the trial court. 214 F.2d at 36-37, n.1.

Finally, AT&T cites to 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, § 2815 (2d ed. 1995).[1] It is interesting that

[1] AT&T's citation is to volume 10 of the treatise, but it is obvious that it meant to refer to volume 11.

AT&T cites to this discussion, since it concerns remittitur, which is precisely what COT was unconstitutionally denied in this case. And once again, this authority supports COT rather than AT&T:

> Except in those cases in which it is apparent as a matter of law that certain identifiable sums included in the verdict should not have been there, the court may not arbitrarily reduce the amount of damages, for to do so would deprive the parties of their constitutional right to a jury.[2]

Id. at 159.

Not one of the authorities cited by AT&T supports its position. There were no separately identifiable sums included in the jury's verdict in this case that the district court could properly have excised. COT Pet. 12. The district court and the Ninth Circuit have not simply misapplied a rule -- they have created an entirely new rule. This new rule would allow a trial court to reduce a general verdict for a flat sum, with no breakdown of amounts for specific items or specific periods, based on the trial court's

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[2] This treatise goes on to state that "the only theory [of remittitur] that has any reasonable claim of being consistent with the Seventh Amendment "is for a trial court to set a remittitur at the maximum amount the jury could have awarded." Id. at 167-68. Here, the district court simply entered a judgment in the amount it believed the jury should have awarded. It failed to grant COT a remittitur with the option of a new trial, in violation of the Seventh Amendment.

own guess or intuition as to what the jury might have found.

AT&T also asserts that COT's petition should be denied because the decisions below are "inherently factbound." AT&T Br. 6. But that is precisely the point. Factfinding in a jury trial is for the jury, not the judge. The district court simply had no place in substituting its view of the evidence for the jury's, at least not without offering COT a remittitur. The new procedure followed by the district court and affirmed by the Ninth Circuit violates the reexamination clause of the Seventh Amendment and cannot be permitted to stand.

5. The district court and the Ninth Circuit have also created a radical new procedure with respect to evidence that the trial court determines post-trial it should not have admitted. As stated in COT's petition, all other courts that have considered the issue have held that the only appropriate relief when this occurs is for the trial court to order a new trial. Not so here. Instead, the Ninth Circuit has published a decision stating that a trial court may reduce a verdict without ordering a new trial simply by excising evidence of damages admitted at trial, so long as the trial court considers the evidence before disregarding it. Merely describing the procedure that was employed in this case demonstrates how nonsensical it is.

The post-trial exclusion of COT's damages evidence is not merely an issue of fairness, although it

certainly was unfair to COT in this case.[3] Rules 50 and 59 and the procedures through which they are applied have been carefully crafted so as not to violate the reexamination clause. By ignoring those procedures and allowing a trial court to disregard evidence considered by a jury, the reexamination clause was clearly violated in this case.

But this issue does not merely involve this case. Instead, the Ninth Circuit's decision represents an open invitation for trial courts to disregard evidence admitted at trial, fail to order a new trial, and reduce a jury's verdict to the amount the trial court believes the jury should have awarded. All that a trial court must do to invade the province of the jury in this manner is to say that it considered the evidence before disregarding it. Such a procedure is not merely nonsensical, it is also a dangerous threat to the Seventh Amendment. This Court should revoke the Ninth Circuit's open invitation before it is accepted by any other district courts.

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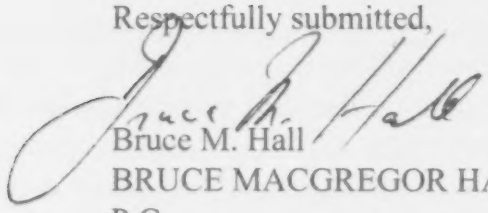
[3] It is highly disingenuous for AT&T to argue that COT had a fair opportunity at trial to present additional expert witnesses on damages, as if COT simply failed to do so. In fact, COT offered to present additional witnesses as to damages, but was led by the district court's rulings to believe this was not necessary. COT Pet. App. 81-86.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDICES

SUPREME COURT OF THE UNITED STATES

Central Office Telephone
Petitioner

v. No. 97-656

AT&T
Respondent

To David W. Carpenter Counsel for Respondent:

YOU ARE HEREBY NOTIFIED pursuant to Rule 12.3 that a petition for writ of certiorari in the above-entitled case was filed in the Supreme Court of the United States on August 27, 1997, and placed on the docket October 15, 1997. Pursuant to Rule 15.3, the due date for a brief in opposition is November 14, 1997. If the due date is a Saturday, Sunday, or federal legal holiday, the brief is due on the next day that is not a Saturday, Sunday, or federal legal holiday.

Unless the Solicitor General of the United States represents the respondent, an appearance/waiver form is enclosed and should be sent to the Clerk only in the event you do not intend to file a response to the petition.

Your attention is directed to Rule 9 of the Rules of the Supreme Court reproduced on the back of the

appearance form. Only counsel of record will receive notification of the Court's action in this case.

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NOTE: This notice is for notification purposes only, and neither the original nor a copy should be filed in the Supreme Court.

SUPREME COURT OF THE UNITED STATES

AT&T
Petitioner

v. No. 97-679

Central Office Telephone
Respondent

To Bruce M. Hall Counsel for Respondent:

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